IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1360

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased,

Petitioners,

—v.—

JOSEPH T. HIGGINS as Collector of Internal Revenue for the Third District of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased, Petitioners, —against— JOSEPH T. HIGGINS, as Collector of Internal Revenue for the Third District of New York.	October Term, 1945. Number

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of Newcomb Cleveland and Bankers Trust Company as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This Petition presents an application for a Writ of Certiorari to review a *final judgment* of the United States Circuit Court of Appeals for the Second Circuit which reversed a judgment of the United States District Court for the Southern District of New York entered in favor of Petitioners and which dismissed the complaint in this action

and which action is known in the record as Action No. 2 (R. 87, 80, *et seq.*, 2 *et seq.*).

The questions presented by this Petition are substantial and are of *public importance* in connection with the administration of the Federal Estate Tax law because the decision of the Circuit Court will, if not reversed, through a misinterpretation of a Federal Estate Tax Regulation and of the decisions of this Court as to *res adjudicata*, lay down an important and impossible rule to be followed by the Commissioner of Internal Revenue, all Federal estate taxpayers and all attorneys practicing Federal Estate Tax law.

The Circuit Court based its decision herein in part upon what your Petitioners claim to be an erroneous construction of Treasury Regulations 80, Article 34 (1934 Edition) which were Regulations promulgated by the Commissioner of Internal Revenue in connection with the Federal Estate Tax and which Article 34 is currently and word for word in force and now known as Regulations 105, Section 81.34 (See said Regulations copied in full on page 18 of the annexed brief.) Since said Regulations are, except for clerical changes, currently in force the questions here presented are likely to again arise, and issues are hereby presented which transcend the instant case and a decision by this Court is required to settle the applicable law.

The Circuit Court also held that because of Article 34, *and otherwise,* Action No. 1 hereinafter referred to was *res adjudicata* of the issues in this instant Action No. 2 (R. 80 *et seq.*) in contravention of many decisions of this Court. The decision of the Circuit Court adds confusion to the doctrine of *res adjudicata* and this is important to future litigants.

This Petition brings up for consideration the allowance against Federal estate taxes of the decedent Erickson, of certain attorneys' fees claimed by Petitioners and conceded by the Circuit Court to be "administration expenses" of decedent's estate and which fees, if allowed, would have the effect of reducing by $7,668.69, with interest, the estate tax on said estate heretofore paid by your Petitioners. The Circuit Court found that said attorneys' fees were "an admini-

stration expense" of said estate under Section 303 of the Revenue Act of 1926 but held that because of said Regulations 80, Article 34, they were not asserted by Petitioners at the proper time, *i.e.* in said Action No. 1. The Petitioners claim that said attorneys' fees were asserted in due and orderly manner, *i.e.* in this Action No. 2, and that the Circuit Court read into said Regulations that which is not fairly embraced therein and held that there was *res adjudicata* when none exists.

This instant action in which certiorari is asked is known in the record as Action No. 2 (R. 2, *et seq.*). Said attorneys' fees were incurred in connection with an action known in the record as Action No. 1 and which Action No. 1 was (after due claims for refund filed and rejected by the Commissioner of Internal Revenue) brought by Petitioners against Respondent to recover certain Federal estate taxes unlawfully exacted by Respondent from Petitioners (R. 47 *et seq.*). Because of *Maass* v. *Higgins*, 312 U. S. 443, and of said Action No. 1, the Respondent was compelled to refund to Petitioners the sum of $105,823.49, with interest, making a total refund of $122,243.53, and said Action No. 1 was upon the payment of said last mentioned sum to Petitioners dismissed with prejudice upon stipulation of the parties thereto (R. 67). The Respondent did not serve or file any answer to the complaint in said Action No. 1 and no issue was raised in that Action No. 1 as to attorneys' fees incurred in connection with that Action No. 1. Said Action No. 1 was so dismissed in July, 1942 (R. 40). No part of the attorneys' bill in question was rendered to Petitioners until August 1, 1942 (R. 37) and said bill for attorneys' fees was not paid by Petitioners until August 24, 1942 (R. 40). The basis for the reversal of said judgment by the Circuit Court was that said attorneys' fees should, because of said Treasury Regulations 80, Article 34 (1934 Edition), have been asserted in said Action No. 1 through the medium of an amended claim for refund filed prior to the dismissal of said Action No. 1 and that Petitioners' failure to so amend its claim in

said Action No. 1 made said Action No. 1 *res adjudicata* of the issues in this Action No. 2 (R. 80 *et seq.*).

A second claim for refund was duly filed by Petitioners after the dismissal of said Action No. 1 and within the statutory time in which said attorneys' fees were claimed as an "administration expense" of said estate and upon the rejection of said second claim for refund by the Commissioner of Internal Revenue, Petitioners brought this present Action No. 2 against Respondent based upon said second claim for refund, in which present Action No. 2 these attorneys' fees incurred in connection with said Action No. 1 were asserted to be an "administration expense" of said estate, the allowance of which would reduce the total Federal estate tax on said estate to the extent aforesaid (R. 2, 10, 11, 12). The District Court as against a motion made by Respondent to dismiss the complaint in this Action No. 2, held that the complaint stated a cause upon which relief could be granted to Petitioners because said claim for attorneys' fees was a new and different claim which could not have been asserted in said Action No. 1 and would have been premature if attempted to have been asserted in said Action No. 1, and that, therefore, said Action No. 1 was not *res adjudicata* of the issues presented by this Action No. 2 (R. 18). This Action No. 2 was, after the denial of said motion to dismiss, tried upon the pleadings and upon the stipulations of the parties and the District Court on the trial before another Judge, without a jury, followed the Judge who heard the motion to dismiss and entered judgment for Petitioners against Respondent (R. 68 *et seq.*, 30, 37, 38, 41, 45, 47, 58, 64, 67).

Both Judges of the United States District Court wrote very satisfactory opinions and neither of them found that said Regulations 80, Article 34, contained what the Circuit Court holds said Regulations to contain nor did either of them find *res adjudicata* (R. 18, 68).

The Respondent then appealed from this judgment of the District Court and the Circuit Court, while holding and not questioning that said attorneys' fees if properly and timely asserted were "administration expenses" of said estate

(which had the effect of reducing the total Federal estate tax on said estate to the extent above indicated), reversed the judgment further holding that the Petitioners could and should, because of said Treasury Regulations 80, Article 34 (1934 Edition), have asserted in whole or in part by amendment to the first claims for refund upon which said Action No. 1 was based the claim for an allowance of said attorneys' fees in said Action No. 1, and that since this was not done, said Action No. 1 was *res adjudicata* of the issues in this Action No. 2 (R. 77, 80, *et seq.*). This holding of the Circuit Court was reached through what Petitioners claim to be a clear misinterpretation of said Treasury Regulations (which Regulations are set forth in full and discussed at page 18 of the annexed brief) and Petitioners claim that once the Circuit Court had embarked upon a misinterpretation of said Regulations it was an easy road to arrive at an incorrect judgment herein and arrive at its holding that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2.

It is Petitioners' claim that said Regulations 80, Article 34, has no application whatsoever to this case because its only applicable language relates to an estimate of attorneys' fees to be made at the *time of filing* the Federal estate tax return and which return was in this Erickson Estate filed four and one-half years before the attorneys' fees now involved had accrued; that no part of said attorneys' fees had accrued as a claim against Petitioners until August 1, 1942 and that consequently no part thereof became a claim against Petitioners until long after the beginning and after the dismissal of said Action No. 1, and which dismissal took place in July, 1942, because no attorneys' bill had been rendered to Petitioners nor were said attorneys' fees paid by Petitioners until after the dismissal of said Action No. 1; and that since this Action No. 2 is founded upon a new claim totally different from any claim involved in said Action No. 1, that said Action No. 1 could not therefore be *res adjudicata* of the issues in this Action No. 2.

This Court has never had occasion to pass upon the interpretation to be given to the aforesaid Regulations but has

passed adversely to Respondent upon the question of *res adjudicata* under such circumstances and has in many decisions disagreed with the Circuit Court.

B.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. As appears from the above summary statement and the annexed brief, this case presents an important aspect of the administration of the revenue which has not been but which should be decided by this Court. The questions presented by the record herein briefly stated are these:

(a) Must a taxpayer who brings an action for the recovery of an illegally assessed Federal estate tax include therein as an "administration expense" of the estate (by amendment of his claim for refund and then, of necessity by supplemental complaint) the attorneys' fees incurred in connection with the very action which he brings for the recovery of such illegally assessed tax, where no attorneys' fees have accrued at the time of the filing of the claim for refund upon which such action is based or at the time of the bringing of said action or have been billed to or paid by the taxpayer until after the dismissal of such action? or

(b) May a taxpayer, in a case set forth in (a) above and after the dismissal of the first action brought for the recovery of said illegally assessed Federal estate tax, file a second claim for refund claiming said attorneys' fees incurred in connection with said first action as an "administration expense" of the estate which has the effect of reducing the total estate tax payable by the estate and upon the rejection of said last-mentioned claim for refund maintain a second action for the recovery of the excess tax resulting from the disallowance of such claim for attorneys' fees?

The above questions pose a very important point of practice to be followed in connection with Federal Estate Tax procedure. These questions have as hereinafter shown already arisen in Federal Estate Tax practice and will continue to arise in various cases until this Court renders final adjudication thereon because said Treasury Regulations are currently in force and now, except for clerical changes, read word for word as they did when said Actions Nos. 1 and 2 were instituted. If the Circuit Court has laid down an erroneous procedure to be followed in tax cases this is a matter of public importance which affects the revenue, all Federal estate taxpayers and all practitioners of Federal Estate Tax law, and is an appropriate case for the granting of a writ of certiorari because of such importance. (See *B. F. Goodrich Co.* v. *United States*, 321 U. S. 126, to this effect, cited in the "Appendix" to this Petition, where certiorari was granted by this Court because of an alleged erroneous decision by a Circuit Court on a procedural question in a Federal estate tax case. See p. 11 *infra*.) This Court often grants certiorari on the ground that the case is of public importance and/or of importance to the revenue as illustrated by the cases decided by this Court and listed upon the "Appendix" to this Petition. (See p. 11, *infra*.)

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but which should be settled by this Court, *i.e.*, the interpretation to be given to said Regulations 80, Article 34, which are currently in force, except for clerical changes. Since said Regulations are currently in force the same question as is presented in the instant action is likely to again arise and this case therefore involves far more than its immediate issues. Based upon what Petitioners claim to be an erroneous construction of said Regulations the Circuit Court has held that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2, which latter action claims attorneys' fees incurred in connection with Federal estate taxes in said Action No. 1 as an "administration expense" of said estate, where said attor-

neys' fees had not matured at the time of the commencement of or at the time of the dismissal of said Action No. 1 and which fees could not therefore have been asserted either in whole or in part in said Action No. 1.

3. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, *i.e.*, the Circuit Court has held that said Action No. 1 which involved a claim totally different from the new and different claim asserted in this Action No. 2 was *res adjudicata* of the issues in this Action No. 2 contrary to the decisions of this Court in *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20; *Bates* v. *Bodie*, 245 U. S. 520; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; and other cases in this Court; and has decided that the dismissal of said Action No. 1 was *res adjudicata* as to the issues in this Action No. 2 when no matters as to said attorneys' fees were in issue or controverted in said Action No. 1, in contravention of the decisions of this Court in *Mercoid Corporation* v. *Mid Continent Investment Company*, 320 U. S. 661; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20; and other cases in this Court.

4. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, *i.e.*, the Circuit Court held that it had jurisdiction of that of which it did not have jurisdiction, *i.e.*, it adjudged that said Action No. 1 in which no claim for attorneys' fees was in issue or had matured at the time of the dismissal of said Action No. 1 was *res adjudicata* of the issues of this Action No. 2, and which Action No. 2 is founded upon a new claim totally different from the claim involved in said Action No. 1, in contravention of such cases as *Mercoid Corporation* v. *Mid Continent Investment Company*, 320 U. S. 661, and *Carter-Crume Co.* v. *Peurrung*, 99 Fed. 888, which latter case was cited with approval by this Court in *United States* v. *Worley*,

281 U. S. 339; and *First National Bank of Birmingham* v. *United States*, 25 Fed. Supp. 816; all of which cases stand for the proposition that before a claim can be adjudicated in an action the claim must be in existence and have maturity at the time of the beginning of the action or mature before judgment and be brought in by supplemental complaint, and that a court attempting to adjudge a claim that has no such maturity or not so brought in is without jurisdiction and that there can be no *res adjudicata* of a new and different claim not involved in the first action when asserted in a second action.

5. The United States District Courts have disagreed as to the proper procedure under the circumstances of this case —three District Courts holding for the Petitioners' contentions and one District Court holding somewhat against the Petitioners' contentions—*i.e.*, *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, and the two District Courts in the case at bar, have held that the claim for attorneys' fees asserted in this Action No. 2 could not have been asserted in said Action No. 1 because of prematurity, whereas, a District Court held somewhat per contra in *Smith* v. *U. S.*, 16 Fed. Supp. 397. This Court has sometimes granted certiorari in such cases of disagreement of the lower courts with the Circuit Court, *i.e.*, *Maass* v. *Higgins*, 312 U. S. 443; *City Bank Farmers Trust Co.* v. *Helvering*, 313 U. S. 121. There is a direct conflict on the questions here presented between *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, which arose in the Fifth Circuit, and the Circuit Court of Appeals herein. Since there is a conflict in the practice to be followed in cases such as this, and since this case presents a case of public importance because said Regulations 80, Article 34, are currently in force in Regulations 105, Section 81.34, under which the same question is likely to again arise and because the Circuit Court has misapplied the doctrine of *res adjudicata*, this Court should lend its aid to the certainty of the law.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and of all the proceedings in the case numbered and entitled on its docket No. 156, October Term 1944, Newcomb Cleveland and Bankers Trust Company as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased, Plaintiff-Appellees, against Joseph T. Higgins as Collector of Internal Revenue for the Third District of New York, Defendant-Appellant, and that said judgment of the United States Circuit Court for the Second Circuit may be reversed by this Honorable Court and that these Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioners will ever pray.

Dated: New York City, N. Y., June 6th, 1945.

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased.

By EARL A. DARR,
Counsel for Petitioners.